## *RE* COURT HILL CANTEEN; GOVERNMENT OF MALAYSIA v. WAN ESAH

**[O.C.J. (Raja Azlan Shah J.) October 28, 1972]**

**[Kuala Lumpur — Orginating Motion No. 62 of 1972]**

*Practice and Procedure — Injunction — Application for perpetual injunction to restrain respondent from entering premises — Whether case should proceed by way of writ or originating motion — Specific Relief (Malay States) Ordinance, 1950, s. 51.*

The applicant sought by way of originating motion for a perpetual injunction to restrain the respondent, her servant or agent from entering the premises known as Court Hill Canteen.

**Held:** a perpetual injunction can only be granted by a decree in a suit. Since an originating motion is not a suit, the motion must fail.

*Case referred to:-*

(1) *L.* v. *L.* [1969] 1 All E.R. 852.

ORIGINATING MOTION.

*Ahmad Fairuz bin Datuk Sheikh Abdul Halim* (Federal Counsel) for the applicants.

*Karam Singh* for the respondent.

**Raja Azlan Shah J.** (delivering oral judgment): This is an application by way of originating motion by the Government of Malaysia for a perpetual injunction restraining the respondent, her servant or agent from entering the premises known as Court Hill Canteen.

The motion was filed on 11th October 1972. In substance the affidavit says that the respondent executed an agreement with the applicants to run the Court Hill Canteen. There is a provision providing for two months' written notice to terminate the agreement. The applicants are not satisfied with the running of the canteen and they accordingly terminated the agreement with the required notice. The respondent failed to vacate and so the applicants have brought this motion.

The ground put forward by counsel for the respondent, though seemingly narrow, is of crucial importance; that is, this case should have been proceeded by way of writ and not by way of originating motion. Counsel cited section 51 of the Specific Relief (Malay States) Ordinance, 1950, which provides that a perpetual injunction can only be granted by the decree made at the hearing and upon the merits of the suit. He accordingly says that the originating motion is not a suit, and therefore the motion is misconceived.

I think the law is very clear. A perpetual injunction can only be granted by a decree in a suit. Since an originating motion is not a suit, the motion must fail. There is another point. One can bring an action for perpetual injunction before filing a writ of summons in a case of urgency. That is clear from the case of *L.* v. *L.*[1] That was a divorce petition where the wife applied *ex parte* for an injunction to restrain the husband from removing the children of the marriage from her custody. The wife proposed to petition for divorce but no petition had been filed. The court held that this does not prevent the issue of an injunction until the action is launched provided it is a case of urgency.

In the present case the motion was filed on 11th October 1972 and up till today there is no indication by way of affidavit or otherwise that the applicants intend to file a writ, nor is there any indication that this is a case of urgency.

The motion is dismissed with costs

*Motion dismissed.*

---

## ARBIAH v. AZINOL

**[A.C.J. (Suffian F.J.) November 1, 1972]**

**[Kuala Lumpur — Civil Appeal No. 52 of 1971]**

*Stamp — Stamp duty — Contract — Written agreement unstamped — Impounding — Duty of court — Stamp Ordinance, 1949, ss. 41, 47, 51 & 52 — Courts of Judicature Act, 1964, ss. 29 & 69.*

The plaintiff/respondent contracted to build a house for the defendant/appellant. They had entered into several written agreements. In this case it was common ground that one document (Ex P1) was chargeable with stamp duty, but it had not been stamped at all. In the court below, the learned president applying section 52 of the Stamp Ordinance, 1949, considered that P1 was inadmissible and ignored its contents except by way of introductory background. He gave judgment for the plaintiff and dismissed the defendant/appellant's counterclaim. On appeal the defendant/appellant applied by notice of motion for the High Court to impound P1 so that after payment of duty and penalty it might be admitted and its contents taken into account.

**Held:** (1) P1 should normally have been stamped before or at the time of execution, but it could also be stamped after execution on payment of a penalty in addition to stamp duty;

(2) in the circumstances of the case the defendant/appellant should pay the whole amount of the duty and penalty.

*Case cited in argument:*

*Fresh Food & Refrigerating Co. Ltd.* v. *Syme & Co. — Behr Mathew Ltd.* [1935] M.L.J. 196.

CIVIL APPEAL.

*Mohamed Azom Shuja* for the appellant.

*Gurdial Bakan Singh* for the respondent.

**Suffian F.J.:** The plaintiff (respondent) is a builder. He contracted to build a house for the defendant (appellant).

The defendant paid the plaintiff, but the plaintiff alleged that the defendant owed him more. He sued the defendant for that amount, and the defendant counterclaimed for various expenses.

There were several written agreements entered into between the parties, but we are concerned at this stage of this appeal with only one document (Exhibit P1). It was common ground that P1 was chargeable with stamp duty, but it had not been stamped at all. The learned president who tried the case, applying section 52 of the Stamp Ordinance, 1949, considered that P1 was inadmissible and ignored its contents except by way of introductory background.

He gave judgment for the plaintiff and dismissed the defendant's counterclaim, and the defendant has appealed to this court.

The defendant applies by notice of motion for this court to impound P1 so that after payment of duty and penalty it may be admitted and its contents taken into account.

Her counsel states that the learned president should have impounded P1 under section 51, but owing to an oversight he (counsel) failed to bring that section to the notice of the learned president. Counsel further submits that this court has power under sections 29 and 69 of the Courts of Judicature Act to impound P1, and send it for stamping and payment of any penalty due, and finally admit the document.

I agree. P1 should normally have been stamped before or at the time of execution, section 41; but it can also be stamped after execution on payment of a penalty in addition to the stamp duty, section 47. The learned president overlooked his duty under section 51 to impound the document. This appeal is a rehearing, and this court can do what he should have done. The document was all the time in the plaintiff's possession. Before the trial the defendant's solicitors intending to rely on it wrote to the plaintiff's solicitors asking them to have it stamped at the defendant's expense, but they refused to do so. At the trial it was the plaintiff himself who produced the document in evidence. In view of this I think that it is just that this court should impound the document and admit it in evidence on payment of the duty and the penalty if any, and I order accordingly.

Who should pay the duty and penalty? The defendant offered to do so in her pre-trial letter to the other side, but in her notice of motion she says that each side should pay half. I think that it is fair that she should pay the whole amount, and I so order.

The appeal will be resumed after the document has been received back from the Stamp Duty Office, and on a date to be fixed by the Registrar.

*Order accordingly*

Solicitors: *Ariffin & Ooi; Gurdial Bakan Singh.*

---

## RAMIAH v. PUBLIC PROSECUTOR

**[A. Cr. J. (Raja Azlan Shah J.) November 3, 1972]**

**[Kuala Lumpur — Selangor Criminal Appeal No. 93 of 1972]**

*Road Traffic — Dangerous driving — What constitutes — Road Traffic Ordinance, 1958 s. 34A(1) — Failure to observe Highway Code.*

The appellant was driving a bus on the main Kuala Lumpur/Ipoh Road. He intended to turn right into Jalan Perhentian. But he did not stop at the junction. The bus collided into a scooter coming from the opposite direction. The pillion rider died as a result of the collision. The learned president found the appellant guilty under section 34A(1) of the Road Traffic Ordinance and sentenced him to one day's imprisonment and fine. He was further disqualified from driving all classes of vehicles for a period of 5 years.

**Held,** dismissing the appeal: in a case under section 34A two things must be established: (a) there must be a situation created by the accused which, viewed objectively, is dangerous; in this case turning right into the side road without stopping to give way to through traffic was dangerous driving; (b) the prosecution must prove that when creating such a situation the appellant was at fault; in this case the accused was at fault in creating the dangerous situation.

*Cases referred to:-*

(1) *Public Prosecutor* v. *Cheong Kam* [1946] M.L.J. 12.

(2) *Public Prosecutor* v. *Low Yong Ping* [1961] M.L.J. 306.

(3) *Lau Lim Peng* v. *Public Prosecutor* [1968] 2 M.L.J. 14.

(4) *R.* v. *Gosney* [1971] 3 All E.R. 220.

(5) *Onassis & Callas* v. *Vergottis* (1968) *The Times*, 1st November.

MAGISTRATE'S CRIMINAL APPEAL.

*Dominic Puthucheary* for the appellant.

*Tengku Suleiman ibni Sultan Ismail Nasiruddin Shah*, (Deputy Public Prosecutor) for the respondent.

**Raja Alzan Shah J.** (delivering oral judgment): The appellant was driving a Sri Jaya bus on the main Kuala Lumpur/Ipoh Road. He intended to turn right into Jalan Perhentian. But he did not stop at the junction. The said bus collided into a scooter coming from the opposite direction. The pillion rider died as a result of the collision. On those simple facts the learned President found the appellant guilty under section 34A(1) of the Road Traffic Ordinance, 1958 and sentenced him to one day's imprisonment and fined him $2,000 in default six months' imprisonment. He was further disqualified from driving all classes of vehicles for a period of 5 years. He appealed against conviction and sentence.

It is not the law under section 34A of the Road Traffic Ordinance that merely because an accident had happened and a person had been killed, danger had in that sense arisen and therefore it must follow, as the night, the day, that the appellant was driving in a manner dangerous to the public. In a case under section 34A, two things must be established. First, there must be a situation created by the accused which, viewed objectively, is dangerous. Dangerous driving is not defined in the Road Traffic Ordinance and it is up to the court to come to a decision on the evidence. Reported cases can only serve as illustrations. For instance as illustrated in *Public Prosecutor* v. *Cheong*